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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-707

ROGER BARTHULI,

*Petitioner,*

v.

BOARD OF TRUSTEES OF JEFFERSON ELEMENTARY SCHOOL DISTRICT,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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The petitioner, Roger Barthuli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of California entered in this proceeding on July 22, 1977.

## OPINIONS BELOW

The opinion of the Supreme Court of California, dated July 22, 1977, is reported at 19 Cal.3d 717, 139 Cal. Rptr. 627 and 566 P.2d 261, and is reprinted as Appendix A hereto, p. 1a, *infra*.

The opinion of the Court of Appeal, First Appellate District, filed on March 8, 1976, has not been reported; it is reprinted as Appendix B hereto, p. 12a, *infra*.

The decision of the Superior Court for the County of San Mateo, filed on January 23, 1974, has not been reported; it is reprinted as Appendix C hereto, p. 19a, *infra*.

## JURISDICTION

The petitioner instituted this action in the Superior Court, seeking a writ of mandate to compel the respondent Board of Trustees of the Jefferson Elementary School District to reinstate him to the position of associate district superintendent for business. The Superior Court denied him any relief, but the Court of Appeal reversed and directed that a writ of mandate issue. On appeal by the respondent, the Supreme Court affirmed the original ruling of the Superior Court that had denied reinstatement. Justice Tobriner filed a dissenting opinion.

The judgment and opinion of the Supreme Court of California were entered on July 22, 1977. On August 25, 1977, that court denied a timely petition for rehearing and an application for stay pending certiorari.[1] The

[1] On September 20, 1977, Mr. Justice Rehnquist issued an in-chambers opinion denying a stay of the judgment of the Supreme Court of California pending certiorari. No. A-247, *Barthuli v. Board of Trustees.*



order denying rehearing is reprinted at the end of the Supreme Court's opinion in Appendix A hereto, p. 11a, *infra*. This petition for writ of certiorari is being filed within 90 days of the order below denying rehearing.

The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

## QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment proscribes the summary dismissal of a public school associate superintendent, without notice or opportunity for a hearing, during his service under a four-year employment contract, where the four-year term has not expired and where such a four-year contract has been specifically authorized by state statute.

2. Whether a state court, in defining property interests for purposes of implementing the Due Process Clause of the Fourteenth Amendment, has "unfettered discretion" to ignore property interests historically associated with or created by contract and to insist that a protectible property interest be incorporated in the form of a state statute.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*United States Constitution, Article I, Section 10:*

No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .

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*United States Constitution, Amendment XIV, Section 1:*

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

*California Education Code, Section 938 renumbered § 35031):*

Any district superintendent of schools, or deputy, associate, or assistant superintendent of schools may be elected for a term of four years. The governing board of any school district, with the consent of the employee concerned, may at any time terminate, effective on the next succeeding first day of July, the term of employment of, and any contract of employment with, the superintendent of schools, or any associate, deputy, or assistant superintendent of schools of the district, and re-elect or re-employ the employee, on such terms and conditions as may be mutually agreed upon by the board and the employee, for a new term to commence on the effective date of the termination of the existing term of employment. In the event the governing board of a school district determines the superintendent of schools of the district is not to be re-elected or re-employed as such superintendent upon the expiration of his term, the superintendent of schools shall be given written notice thereof by the governing board at least six months in advance of the expiration of his term. In the event the governing board of a district fails to re-elect or re-employ the superintendent of schools of the district as such superintendent and the written notice herein provided for has not been given, the superintendent of schools shall be deemed re-elected for a term of the same length as the one completed, and under the same terms and conditions and with the same compensation.

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*California Education Code, Section 13314 (renumbered §§ 44893, 87454):*

A permanent employee when advanced from a teaching position to an administrative or supervisory position . . . shall retain his permanent classification as a classroom teacher.



*California Education Code, Section 13315 (renumbered §§ 44897, 87458):*

A person employed in an administrative or supervisory position requiring certification qualifications upon completing a probationary period, including any time served as a classroom teacher, in the same district, shall . . . be classified as and become a permanent employee as a classroom teacher. . . .

## STATEMENT OF THE CASE

The critically important federal constitutional problems in this case stem from an event on July 11, 1973. On that day the petitioner, Roger Barthuli, was summarily discharged by the respondent Board of Trustees from his position as associate superintendent of business of the Jefferson Elementary School District. On that day petitioner was in the midst of serving under the third in a series of multi-year employment contracts, the first of which had commenced in 1965. Each contract ran for four years, the term of the one in question running from July 1, 1972, to June 30, 1976. Thus, at the time of the summary discharge, nearly three years remained on the unexpired contract term. At no time prior to the discharge was petitioner given any notice of charges or an opportunity for a hearing.[2]

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[2] On July 12, 1973, petitioner by letter demanded reinstatement as associate superintendent. But the Board did not respond to this letter. Petitioner was not informed of the reasons for his dismissal until much later, when the Board filed its answer to petitioner's complaint in this action. It then appeared for the first time that the official minutes of the Board, dated July 11, 1973, contained a notation that petitioner's contract was rescinded "because of his prior breach of his employment contract." Cl. Tr., p. 11. The minutes, however, did not describe the nature of this alleged breach.

This third contract, like its two immediate predecessors, had been entered into pursuant to Section 938 of the California Education Code, which authorizes school districts to employ and re-employ an associate superintendent of schools "for a term of four years . . . on such terms and conditions as may be mutually agreed upon by the board and employee." This statute, however, does not list grounds for dismissal of an associate superintendent, and says nothing about any notice of misconduct charges or any opportunity for a hearing on such charges where a dismissal is sought during the term of any four-year employment contract.

The employment contract itself, which is set forth in full in footnote 1 of Justice Tobriner's dissenting opinion below, Exhibit A hereto, p. 7a, *infra*, is equally silent about any dismissal grounds or procedures during its four-year term. The contract in question simply provides that the employment of petitioner as associate superintendent shall be continued "for a four (4) year term" at an annual salary of $26,336.04.

Shortly after his dismissal in 1973, petitioner instituted this suit in the Superior Court for San Mateo County, seeking a writ of mandate to compel the Board of Trustees to reinstate him to the position of associate superintendent for business. The Superior Court denied the peremptory writ on the theory that petitioner had an adequate remedy at law, i.e., an action for breach of contract and an award of money damages.[3] Alternatively, the court found

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[3] Mr. Justice Rehnquist stated in his in-chambers opinion denying the stay application in this case (p. 2. of slip opinion) that the Supreme Court of California affirmed this finding of the Superior (continued)



after a hearing that the petitioner had failed adequately to perform his duties and that the Board was justified in rescinding the contract of employment.[4] A copy of the Superior Court's decision is attached as Appendix C hereto, p. 19a, *infra*.

Petitioner appealed to the Court of Appeal for the First Appellate District, which unanimously reversed the Superior Court's judgment and ordered that a writ of mandate issue,

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[3] (continued)
Court that petitioner had an adequate remedy at law and hence was not entitled to a peremptory writ. But the Supreme Court simply "affirmed" the judgment of the Superior Court, and for quite different reasons than those advanced by the Superior Court. The opinion of the Supreme Court barely mentions, in summary fashion, the Superior Court's finding respecting the choice of remedies, and makes no effort to approve or disapprove that finding. See Appendix A hereto, p. 2a, *infra*. And at the end of its opinion, the court noted, as a fact, that petitioner "has not sought damages for breach of contract." See p. 5a, *infra*. Indeed, at another point in its opinion, the Supreme Court recognized that reinstatement – by means of a writ of mandate – is "an appropriate remedy when an employee has been discharged in violation of his statutory rights." Appendix A, p. 2a, *infra*. Thus the Supreme Court did not order that the writ of mandate issue here only because petitioner was found not to have a protectible "property" interest in his position as associate superintendent. See also dissenting opinion of Justice Tobriner, Appendix A, p. 10a, *infra*.

[4] The Superior Court found that petitioner's conduct that justified rescission consisted of his "improper bidding practices and issuance of purchase orders, his failure to follow the law in that regard, his failure to follow and carry out the directives and policies of his board, and his failure to adequately prepare, maintain and assume the general management of the district's transportation, budget, contracts and leases, purchases and warehousing, maintenance of physical plant, payroll and related records, accounts payable, inventory of equipment, and necessary repairs." Appendix C hereto, p. 21a, *infra*.

directing the reinstatement of petitioner to his position as associate superintendent of business. A copy of the Court of Appeal opinion, dated March 8, 1976, appears as Appendix B hereto, p. 12a, *infra.*

The Court of Appeal premised its holding squarely on the proposition – which had first been put in issue before that court – that the manner in which petitioner had been discharged violated his due process rights under the Fourteenth Amendment. The court held (1) that petitioner had a property interest in the continuation of his employment under a four-year contract authorized by Section 938 of the California Education Code, and (2) that this property interest is protected by the Fourteenth Amendment's Due Process Clause, to the extent that the state cannot impose any sanction or extinguish the contract without according the employee such minimal procedural safeguards as notice of the proposed action, the reasons therefor, a copy of the charges, and the right to respond thereto. See Appendix B hereto, pp. 16a-17a, *infra.*

The Board of Trustees then petitioned the Supreme Court of California for a hearing, which was granted. On July 22, 1977, by a 5 - 1 vote,[5] the Supreme Court filed an opinion that in effect and by express order affirmed the judgment of the Superior Court, without in any way mentioning the decision of the Court of Appeal and without assessing or approving the rationale of the Superior Court's

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[5] The opinion of July 22, 1977, was rendered by a 5 - 1 vote, Acting Chief Justice Tobriner dissenting. Retired Chief Justice Wright and retired Associate Justice Sullivan sat by assignment. On the rehearing, however, the new Chief Justice Bird (who had not participated in the original decision) joined Justice Tobriner in noting that "the petition should be granted."



judgment. See Appendix A hereto, p. 1a, *infra.* In essence, the Supreme Court interpreted Section 938 of the California Education Code, which authorizes four-year employment contracts for associate superintendents, as conferring no statutory tenure or right with respect to the position of associate superintendent. And since it could find no provision in Section 938 or any other section of the Education Code that lists grounds for dismissal of associate superintendents in the midst of their contract terms, or that provides notice and a hearing on charges of misconduct, the court concluded that the Code establishes "that administrative and supervisory personnel do not possess a statutory right to their positions." Appendix A hereto, p. 3a, *infra.*

In reaching that conclusion, the Supreme Court contrasted the "numerous" state statutes listing grounds for classroom teacher dismissal and providing hearings on charges of teacher misconduct. Moreover, in the court's view, the petitioner Barthuli retained his permanent classification as a classroom teacher (see Section 13314 of the California Education Code) upon his earlier advancement to the position of associate superintendent, and hence he could have "sought reinstatement to a classroom teacher position." See Appendix A hereto, p. 3a, *infra.* Under the court's theory, as a result of his summary discharge from the position of associate superintendent, petitioner could have been reinstated to a position as a classroom teacher, a position he had not held for at least nine years; and had the Board of Trustees then wished to discharge him from the position of classroom teacher, it would have been compelled to follow the notice requirements of the statutes governing classroom teachers. But the court did not explain why petitioner's permanent status as a classroom teacher did not suffice to entitle him to due process protection upon discharge from any position – teach-

er or administrator – that he held while he maintained such status. Nor was it explained why the Board of Trustees was absolved of all due process obligations in summarily discharging an employee who had permanent tenure as a teacher while acting in a non-permanent four-year contractual administrative role.[6]

Having thus made the predicate finding that California statutes create no tenure and no dismissal procedures with respect to administrative personnel, the Supreme Court of California reached the ultimate constitutional conclusion that petitioner's summary dismissal was in no way violative of his due process rights under the Fourteenth Amendment. Disregarding the fact that the employment contract promised the petitioner a four-year term of service, as authorized by Section 938, the court held that petitioner had no "property interest" protectible by the Due Process Clause of the Fourteenth Amendment. This Court's decision in *Board of Regents v. Roth,* 408 U.S. 564, 576-577 (1972), was cited and quoted in support of the court's rejection of petitioner's federal constitutional claim; and *Perry v. Sindermann,* 408 U.S. 593, 601 (1972), was cryptically distinguished on the ground that it involved the issue "whether there was a property interest when no statute provided for one – not the issue whether a statute concededly creating a property interest should be given effect as defining the interest."

Justice Tobriner's dissenting opinion termed the majority's conclusion "simply inexplicable." In his view, this Court's

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6 The court also failed to explain why the due process infractions that presumably occurred on July 11, 1973, when petitioner was summarily discharged, were somehow immunized by petitioner's subsequent failure to seek reinstatement as a classroom teacher.



decisions in *Board of Regents v. Roth, supra,* and *Perry v. Sindermann, supra,* as well as subsequent decisions in other courts, mandate a recognition that a term of employment expressly set by contract is a property interest that a state cannot extinguish without conforming to the dictates of procedural due process.

## RAISING THE FEDERAL QUESTIONS

Petitioner did not raise any federal questions until the appeal was had before the intermediate Court of Appeal below. It is plainly evident from the opinions of that court and of the Supreme Court of California that these federal questions were fully considered and resolved. Any inquiry into how and when such issues were first raised is accordingly unnecessary, for there "can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio,* 360 U.S. 423, 436 (1959).

## REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of California has compounded the constitutional confusion surrounding the summary discharge of public school administrators and employees. And much of what the court below has held seems directly at war with the relevant decisions of this Court and of other tribunals. Moreover, the decision by one of the most influential of the state courts has cast a grave shadow over the continued employment prospects of countless public school administrators throughout the United States, particularly those whose reasonable expectations to security of interest in their jobs have heretofore been defined by their contractual terms of employment.

This case thus provides another opportunity for this Court to examine and to clarify the due process rights of public employees summarily discharged from their positions – a process begun but not finished in *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Arnett v. Kennedy*, 416 U.S. 134 (1974); and *Bishop v. Wood*, 426 U.S. 341 (1976). Indeed, one respected commentator has recently asserted that in those four decisions "the Supreme Court has been notably unable to develop a satisfying approach for resolving claims to security of government largess."[7] Cf. *Board of Curators of the University of Missouri v. Horowitz*, No. 76-695, now pending before this Court for decision as to the due process rights of medical school students dismissed for academic cause. Perhaps this case can be the vehicle for refining and synthesizing some of the concepts that have divided the Court in these four cases, concepts that the court below obviously found difficult to fathom and to apply.

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[7] Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U.Chi.L.Rev. 60, 62 (1976). The author is a professor of law at Stanford University. Professor Rabin noted that *Goldberg v. Kelly*, 397 U.S. 254 (1970), "presaged claims for judicial recognition of entitlements to a wide variety of forms of government largess" (*id.*); and he further noted that the "traditional distinction between rights and privileges assumed that some kinds of interests – 'rights' – were entitled to procedural due process safeguards," but that it is clear "that the case law of the 1970s rejecting the rights-privileges approach dates from and is based upon the *Goldberg* recognition of a 'property' interest in welfare benefits" (*id.*, n. 8).



**1. The decision below conflicts with the relevant decisions of this Court and of other courts with respect to defining the property interest in a term of public employment specified in a contract.**

At the outset, the decision below totally ignores the rulings of this Court and of other courts to the effect that a contractual term of employment confers on the public employee a property interest protectible by the Due Process Clause of the Fourteenth Amendment. The California court has concentrated solely on the property interests discoverable in state statutory provisions, thus disavowing any attempt to assess whether a protectible property interest could stem from the terms of the employment contract in issue and from the state law concerning such a contract. See, e.g., California Civil Code §655 and §1428, which together define "property" to encompass the ownership of "all obligations," including the obligations created by the "contract of the parties."

In this case, the petitioner's contract plainly entitled him to continued employment as an administrator for an express term of four years – a contract and a term that were expressly authorized by state statute (California Education Code, Section 938). Had the court below respected this Court's opinion in *Perry v. Sindermann*, 408 U.S. at 601, it would have been compelled to recognize the property interest implicit in that contract. The Court there said, in unmistakable words, that

> "A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown."

It was precisely that kind of "formal understanding" that this Court referred to in *Roth*, 408 U.S. at 577, by way of defining the types of property interests "that secure certain benefits and that support claims of entitlement to those benefits."[8] And nothing that this Court held in the *Arnett* or *Bishop* cases, where express contractual terms of employment were not involved, would appear to detract from the continuing force of the *Perry* statement.

Moreover, all federal and state courts that have dealt with this problem since the *Perry* and *Roth* decisions have agreed that a contractually specified term of employment is a property interest for due process purposes. Thus in *Hostrop v. Board of Junior College District No. 515*, 471 F.2d 488, 494 (C.A. 7, 1972), certiorari denied, 416 U.S. 967, the Seventh Circuit, citing *Perry* and *Roth*, stated:

> "A term of employment set by contract has been recognized as a property interest which the state cannot extinguish without conforming to the dictates of due process . . . . The existence of such a contractually-established property interest [the employment term had two years to run at the time of the discharge in this case] obligates the Board to grant plaintiff [a college president] a hearing where he can be fully informed of the reasons for his nonretention and challenge their sufficiency."

Similarly, in *Staton v. Mayes*, 552 F.2d 908, 911 (C.A. 10, 1977), certiorari denied on other issues, Oct. 17, 1977, No. 76-1625, the Tenth Circuit in reliance on *Roth* ruled:

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[8] *Perry* and *Roth*, of course, involved failures to renew contracts of employment upon their expiration. But the instant case is much stronger in terms of finding a property interest. It involves not a failure to renew but a summary discharge at a point when the contract term had nearly three years to run.



> "As the predicate for his procedural due process claim, plaintiff [a public school superintendent] argues that he had a property interest by virtue of his contracts that had been renewed to extend to June 30, 1974, at $25,000 per year, with 1 5/12 years remaining . . . . And he asserts that he had a deprivation of liberty and property by the stigma of being branded incompetent and guilty of willful neglect of duty.
>
> "We must agree with both contentions. Plaintiff had a legitimate claim of entitlement to his position derived from his contracts. *Board of Regents v. Roth*, 408 U.S. 564, 577. . . . We are convinced that the procedural due process guarantee applied to insure the plaintiff fundamentally fair procedures in connection with these proceedings concerning his proposed discharge."

To the same effect are *McClanahan v. Cochise College*, 24 Ariz. App. 13, 540 P.2d 744, 749 (1975); *Wertz v. So. Cloud Unified School District*, 218 Kan. 24, 542 P.2d 339, 344-346 (1975).[9]

The short of it, to augment a statement in *Roth*, 408 U.S. at 576-577, is that public school administrators, like "college professors and staff members dismissed during the terms of their contracts, *Wieman v. Updegraff*, 344 U.S. 183, have interests in continued employment that are safeguarded by due process." The studied refusal of the California court to acknowledge the federal due process implications of a summary dismissal prior to the termination of a contractual term

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[9] See also *Roane v. Callisburg Independent School District*, 511 F.2d 633, 638 (C.A. 5, 1975); *Peacock v. Board of Regents*, 380 F.Supp. 1081, 1086 (D.Ariz. 1974), affirmed 510 F.2d 1324 (C.A. 9, 1975), certiorari denied, 422 U.S. 1049.

of employment simply cannot be squared with the numerous holdings to that effect by this Court and other state and federal courts. To permit such a refusal to go unreviewed and uncorrected, particularly in light of the conflicts, is to encourage wholesale disregard by other courts of the due process rights of public school administrators.

**2. The decision below adds confusion to the judicial search for property interests protectible under the Due Process Clause.**

Justice Tobriner has pinned the label of "simply inexplicable" on the failure of the majority of the court below to follow "the clear mandate of the *Roth* and *Perry* decisions" and to apply the Due Process Clause to the severing of petitioner's property interest in the completion of his contractual term of employment. Appendix A, p. 10a, *infra*. The majority opinion below is further "inexplicable" in terms of its notion that state statutory law is the *sole* source for determining what property interests are protected by the Due Process Clause. The Court's extended discussion in *Perry*, 408 U.S. at 599-603, respecting the diverse sources from which property interests may spring – i.e., express contracts, implied contracts, existing rules or understandings, the unwritten "common law" in colleges or schools, as well as statutes – is enough to condemn the California court's myopic approach to this constitutional problem.

Yet a more important and mystifying question emerges from the California court's assessment of state law in this federal constitutional context. The highest court of California has made a definitive assessment of state law respecting the tenure status of public school administrative personnel; and it has found that California law permits them no permanent status. That ruling and that delineation of



state law thus exascerbate the problem that divided this Court in *Bishop v. Wood, supra,* the problem as to whether a state may grant or withhold protectible property interests in its "unfettered discretion." See 426 U.S. at 350, n. 14. The decision below adds confusion to that problem in the following ways:

(a) Even under the majority pronouncement in *Bishop* that state law definitively controls the definition of a property interest protectible by the Due Process Clause, does it follow, as the California court would have it, that the only relevant state law to be examined is that contained in state statutes? Certainly not, if one carefully reads *Roth* and *Perry* and *Bishop*. *Roth* said the definition of property interests was to be found in "existing rules or understandings that stem from an independent source such as state law" – without specifying that the state law can only be statutory in nature. 408 U.S. at 577. *Perry* said that the definition could come from a wide variety of sources, many of them obviously non-statutory in nature. And *Bishop* is equally devoid of any suggestion that the state law to be examined is strictly that emanating from the state legislature; indeed, the majority in that case stated that a property interest in employment can be "created by ordinance, or by an implied contract" – and hence necessarily by an express contract. 426 U.S. at 344.[10] The California court's exclusive con-

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[10] In *Bishop*, where the focus was on the controlling North Carolina law, this Court's inquiry began with the North Carolina decision in *Still v. Lance*, 275 N.C. 254, 182 S.E.2d 403 (1971). In this Court's words (426 U.S. at 345), *Lance* "held that enforceable expectation of continued public employment in that State can exist only if the employer, by statute *or contract*, has actually granted some form of guarantee." [Emphasis added.] Since there was no contract involved in *Bishop*, there was no occasion to examine the North Carolina law of contracts.

centration on the statutory aspects of state law not only conflicts with those rulings but raises a new and confusing constitutional enigma: Does a state court have "unfettered discretion" to exclude from the federal constitutional concept of protectible property interests all but those created by state statutes?

(b) The California court's search for some state statute that not only gives some form of tenure to a public school administrator but makes specific due process promises to him[11] raises a confusing version of the debate suggested by the plurality opinion in *Arnett v. Kennedy*, 416 U.S. at 153-154, which argued that a public employee is entitled to only that due process that has been authoritatively promised by official statute and regulation. The implication of the California ruling seems to be that a state court has "unfettered discretion" to insist, as a condition of recognizing a protectible property interest, that the due process rights of a public school administrator be written into an authoritative statute. If that proposition were accepted, however, the Due Process Clause of the Fourteenth Amendment would become surplusage; those protected by statutory due process would find it unnecessary to rely on the Due Process Clause, while those not protected by statute would find that they have no property interest protectible by the Due Process Clause.

(c) Even if the California court were correct in insisting that a property interest be defined by some state statute, does that court have "unfettered discretion" to ignore state statutes that authorize the creation of contractual property

[11] See the California court's contrasting reference to statutes dealing with classroom teachers that provide "hearings for charges of teacher misconduct" and thus create a protectible property interest. Appendix A hereto, p. 3a, *infra*.



interests? As was said by the Court of Appeal below with reference to the four-year employment contract in question, "This contract was specifically authorized under section 938, and therefore appellant had a property interest in the continuation of his employment created by and authorized by applicable state law." Appendix B hereto, p. 17a, *infra*. If that statement be true, and the California Supreme Court did not disagree with it, then the court below has truly used its discretion to ignore or bury what by its own standards would be a statutorily-authorized property interest.

(d) Does a state court have "unfettered discretion" to deny due process protection to a public employee who possesses permanent tenure status merely because the post from which he has been summarily ousted has been found to have no permanent tenure characteristics? Here, of course, Section 13314 of the California Education Code gave petitioner tenure as a classroom teacher, but not as an administrator. And he did not lose that tenure in the course of serving as an associate superintendent. Presumably, under the California court's reasoning, reinstatement as a classroom teacher cures all due process defects in one's summary discharge as an administrator. Thus the question is raised whether the benefits of the Due Process Clause are to be available, in the discretion of the state court, only if the tenured employee seeks reinstatement to the lower classified job to which the tenure originally attached. Must he forfeit those benefits simply because he protests and seeks reinstatement to the higher administrative position from which he was summarily dismissed?

Such, then, are the reasons why the decision below puts into sharp focus the ultimate problem adverted to in *Bishop* – the extent to which a state court has "unfettered discretion" in defining, granting and withholding property interests

that are subject to protection under the Due Process Clause of the Fourteenth Amendment. Unless some limits are placed on that discretion, a state court could easily and arbitrarily define out of existence virtually all property interests in public employment, at least those that are not indelibly engraved in some state statute. The minimal due process protections afforded by the Due Process Clause would then become a dead letter insofar as many public employees are concerned.

While the *Bishop* majority rejected (426 U.S. at 349, n. 14) Mr. Justice Brennan's "remarkably innovative suggestion that we develop a federal common law of property rights," the time may have come to recognize that certain types of property interests may have federal constitutional ingredients that protect them from "unfettered" destruction by state courts. Contracts of employment are a case in point. Article I, Section 10, of the Constitution prohibits any state from passing any law "impairing the Obligation of Contracts." If by state law an employment contract creates a property interest within its own four corners and if a state court nonetheless defines that property interest as being nonexistent because not incorporated in some state statute, has not the employment obligation of that contract been "impaired" if not destroyed? And if that is so, would it not be the ultimate obligation of this Court to insist that such a contract not be impaired by a state court, by way of depriving the property interest implicit in the contract of the Due Process Clause protection to which it is entitled?

The many questions raised by the decision below clearly deserve consideration and resolution by this Court.



**3. The questions raised by the decision below are of far-reaching importance, affecting countless public school administrators throughout the United States.**

The importance of the constitutional issues in this case far transcends the impact of the decision below on the two parties before the Court. According to the HEW's National Center for Educational Statistics, there are more than 170,000 public school employees of administrative and supervisory status throughout the United States; in California alone there are nearly 20,000 individuals employed in such capacities in the state educational system. Many of them serve under multi-year employment contracts. In this great reservoir of public school administrators countless numbers are now under the direct threat of summary dismissal posed by the decision below.

Already the ruling of the California Supreme Court has been widely heralded to all school boards in California as the dawn of a new legal and constitutional principle – "that an administrator has no property right in his/her employment, and has no rights of due process prior to termination."[12] Similar proclamations of the destruction of public school administrators' due process rights can be expected as news of the ruling below spreads throughout the land.

Whether or not a rash of summary dismissals follows in the wake of this decision, the perceived destruction of such

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12 California School Boards Association *Newsgram*, Vol. 77, No. 8, Aug. 29, 1977, p. 1. Legal counsel of that association added that the decision means "that administrative personnel in a school district have no property right in their employment and, therefore, do not have the rights of due process of notification, hearing, etc. prior to any termination for cause." *Ibid.*, p. 4. But the association did advise school boards in California "to approach actions based on this decision with great caution." *Ibid.*, p. 1.

due process rights can have a most chilling effect on the desire of many competent and innovative administrators to serve the public schools of the nation. The four-year feature of the contract involved in this case is not unique. It is a widely used device to attract administrators of character and experience. It is a device that promises them more than a short-term or illusory security; it gives them both the opportunity and the time to develop much-needed improvements in the school systems without the fear of sudden and summary discharge by oft-politicized school boards. But if four-year contracts are no longer to mean what they so plainly say and promise, few but the uninspired will be attracted to such administrative posts.

Perhaps even more unfortunate, were the decision below to remain unreviewed and uncorrected, will be the ensuing erosion of our constitutional values of procedural due process. While the *Bishop* majority noted that the federal courts are not the appropriate forums in which "to review the multitude of personnel decisions that are made daily by public agencies," 426 U.S. at 349, it obviously did not thereby confer *carte blanche* on state courts to ignore minimal due process requirements in assessing the abuses that inevitably arise out of such a "multitude of personnel decisions that are made daily by public agencies."

The Due Process Clause of the Fourteenth Amendment has a more enduring role to play in the public sector sphere of activity than the California court is willing to concede.



## CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| ROGER BARTHULI,<br>Plaintiff and Appellant,<br><br>v.<br><br>BOARD OF TRUSTEES OF JEFFERSON ELEMENTARY SCHOOL DISTRICT,<br>Defendant and Respondent. | ) | S.F. 23467<br><br>Super. Ct. No. 177187 |

[Filed July 22, 1977]

Petitioner appeals from judgment denying writ of mandate sought to compel his reinstatement as an associate superintendent for business in respondent school district. We affirm the judgment.

Petitioner held the position of associate superintendend of business for eight years. On 1 July 1972, petitioner and respondent entered a contract pursuant to Education Code section 938 (§35031),[1] renewing his employment for a four-year term. The board of trustees voted to rescind the contract on 11 July 1973 "because of [petitioner's] prior breach of his employment contract."

The petition for writ of mandate alleges petitioner was at all times ready to perform, did not consent to

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[1]Unless otherwise indicated, all references are to the Education Code. The Education Code was renumbered effective 30 April 1977. This opinion retains the former section numbers followed by a parenthetical notation indicating the new numbers.

the rescission, was not notified or provided a statement of reasons prior to rescission, and demanded reinstatement. The trial court ruled mandamus would not lie because petitioner possesses an adequate remedy at law in an action for breach of contract. The court held that petitioner had acquired the status of a permanent certificated employee as a classroom teacher but had not sought reinstatement to that position. Additionally, the court found petitioner was not entitled to a peremptory writ because respondent had shown, by a preponderance of evidence, petitioner breached the employment contract. The latter portion of the court's decision was based on findings petitioner failed to fulfill the responsibilities of his position concerning budgets, accounts and payroll; failed to carry out respondent's directives; improperly split purchase orders to avoid legally mandated competitive bidding; and allowed improper use of school district property. Reinstatement has been recognized as an appropriate remedy when an employee has been discharged in violation of his statutory rights (e.g., Blodgett v. Board of Trustees (1971) 20 Cal. App. 3d 183, 190; Ball v. City Council (1967) 252 Cal. App. 2d 136, 141) or constitutional rights (e.g., Beckiaris v. Board of Education (1972) 6 Cal. 3d 575, 593; Bagley v. Washington Township Hospital Dist. (1966) 65 Cal. 2d 499, 503-505; Fort v. Civil Service Commission (1964) 61 Cal. 2d 331, 334, 340).

Provisions of the Education Code govern employment of associate superintendents. Section 938 (§35031) provided in relevant part: "Any . . . associate . . . superintendent of schools, may be elected for a term of four years. The governing board of any school district, with the consent of the employee concerned, may at any time terminate, effective on the next succeeding first day of July, the term of employment of, and any contract with . . . any associate . . . superintendent of schools of the



district, and re-elect or re-employ the employee, on such terms and conditions as may be mutually agreed upon by the board and employee, for a new term to commence on the effective date of the termination of the existing term of employment."

Section 13314 (§§44893, 87454) provided that a tenured teacher "when advanced from a teaching position to an administrative or supervisory position . . . shall retain his permanent classification *as a classroom teacher.*" (Italics added.) Section 13315 (§§44897, 87458) stated: "A person employed in an administrative or supervisory position requiring certification qualifications upon completing a probationary period, including any time served as a classroom teacher, in the same district, shall . . . be classified as and become a permanent employee *as a classroom teacher.*" (Italics added.)

Although numerous statutes list grounds for teacher dismissal, providing hearings for charges of teacher misconduct (see, e.g., Turner v. Board of Trustees (1976) 16 Cal. 3d 818, 822–823), there are no similar statutory provisions governing assistant superintendent misconduct.

In the absence of such provisions sections 13314 (§§44893, 87454) and 13315 (§§44897, 87458) must be read as establishing that administrative and supervisory personnel do not possess a statutory right to their positions. The statutes vest such persons with rights to the position of classroom teachers, not to administrative positions. (See Board of Education v. Swan (1953) 41 Cal. 2d 546, 555; Holbrook v. Board of Education (1951) 37 Cal. 2d 316, 334; Council of Directors and Supervisors v. Los Angeles Unified Sch. Dist. (1973) 35 Cal. App. 3d 147, 152; Hentschke v. Sink (1973) 34 Cal. App. 3d 19, 22.) Petitioner has not sought reinstatement to a classroom teacher position, nor has respondent indicated that petitioner would be refused such posi-

tion. Petitioner does not contend the contract of employment for an administrative position is specifically enforceable. (See Civ. Code, §3390, subds. 1, 2; 7 Witkin, Summary of Cal. Law (8th ed. 1974) Equity, §48, pp. 5270-5271.)

We are satisfied that in absence of a deprivation of a constitutional right, reinstatement to his former position is not an available remedy for a discharged assistant superintendent; reinstatement is available only to the position of classroom teacher. Insofar as Titus v. Lawndale School Dist. (1958) 157 Cal. App. 2d 822, and Main v. Claremont Unified School Dist. (1958) 161 Cal. App. 2d 189, are contrary, they are disapproved.

Petitioner claims a denial of constitutional rights because he was given no notice, no specification of reasons, and no opportunity to respond prior to the termination of his contract. Petitioner asserts he possessed a legitimate expectation of entitltement ot continued employment as an administrator, and he therefore was denied his preremoval procedural due process rights. He relies primarily upon this court's decision in Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194.

In *Skelly* we held that a *permanent civil service* employee is entitled to "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing the discipline." (*Id.* at p. 215.) This holding is predicated on the finding that permanent civil service employees possess a property right in continued employment because they cannot, under statutory law, be disciplined without cause. (*Id.* at p. 207.)

Quoting at page 206 from Board of Regents v. Roth (1972) 408 U.S. 564, 576-577, we pointed out that property interests may take many forms: "'To have a



property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. [¶] Property interests, of course, are not created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" (Skelly v. State Personnel Bd., *supra*, 15 Cal. 3d at p. 207.)

Petitioner, in his position as an administrator, is not a permanent employee. (Council of Directors and Supervisors v. Los Angeles Unified Sch. Dist., *supra*, 35 Cal. App. 3d 147, 152.) The Legislature has not given him a property right in the administrative position. Rather, the Legislature has made clear by sections 13314 (§§44893, 87454) and 13315 (§§44897, 87458) that petitioner's tenure rights and thus his property rights are those of a classroom teacher and not those of an administrator. Respondent has not denied or repudiated petitioner's classroom teacher property interests, and the procedural rights recognized in *Skelly* are inapplicable.

Perry v. Sindermann (1972) 408 U.S. 593, 601, is distinguishable. It held that a nontenured teacher employed for four years prior to discharge had a property interest based on "mutually explicit understandings." The case involved the issue whether there was a property interest when no statute provided for one—not the issue whether

a statute concededly creating a property interest should be given effect as defining the interest.

Petitioner has not sought damages for breach of contract.

The judgment is affirmed.

CLARK, J.

WE CONCUR:

MOSK, J.
RICHARDSON, J.
WRIGHT, J.*
SULLIVAN, J.**

**Retired Associate Justice of the Supreme Court sitting under assignment by the Acting Chairman of the Judicial Council.

**Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.



*CONCURRING AND DISSENTING OPINION BY TOBRINER, ACTING C.J.*

Although I concur in the majority's initial conclusion that plaintiff enjoys no statutory tenure rights to his assistant superintendent position, I cannot agree that defendant board of trustees properly dismissed plaintiff in the middle of his four-year employment contract term without affording him notice of the charges against him or a hearing of any sort. In reaching the conclusion that plaintiff is entitled to none of the procedural due process protections afforded by the numerous recent decisions of both the United States Supreme Court and this court, the majority rely solely on the fact that plaintiff possessed no *statutory* entitlement to his administrative position. The majority overlook, however, the fundamental principle that "property interests" protected by the state and federal due process provisions may arise from the terms of a *contract* as well as from the language of a *statute*.

In this case, plaintiff's employment contract clearly provided him with a "legitimate claim of entitlement" to continued employment for the duration of the four-year term of his contract.[1] Thus, while the board of trustees

[1]The record expressly reflects that the district entered into a four-year contract with the plaintiff. The contract, as set forth in the record and signed by the chairman of the board of trustees, stated in full: "At the regular meeting of the Board of Trustees of the Jefferson Elementary School District, held on June 21, 1972, it was regularly voted to continue the employment of Roger Barthuli as Associate Superintendent-Business, for a four (4) year term, beginning July 1, 1972 and ending June 30, 1976. The salary of the Associate Superintendent-Business, shall be specified below:

"The annual salary will be $26,336.04 payable at the rate of $2,194.67 per calendar month of service beginning July 1, 1972.

(continued)

unquestionably retained the authority to terminate the contract on the basis of the charges discussed in the majority opinion, the due process clause of the state and federal Constitutions precluded the board from dismissing plaintiff on the basis of such charges without affording him any notice or opportunity to respond to the charges.

The flaw in the majority's analysis becomes apparent upon just a brief review of the seminal United States Supreme Court decision of Board of Regents v. Roth (1972) 408 U.S. 564, a decision upon which the majority purport to rely. In *Roth*, the court explained at some length the nature of the "property interests" to which the due process clause applies. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of itnerests that a person has already acquired in specific benefits. These interests—property interests—

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[1](Continued)
[¶] The salary rate for subsequent three years may be determined by Board action annually, prior to July 1; however, the Board reserves the right to increase the Associate Superintendent's salary at any time. It is stipulated that the salary rate for the subsequent three years shall not be less than the salary rate paid during the first year of service under this contract. [¶] It is stipulated that service will be required for twelve months of full and regular service during the period covered by this contract with the exception that the Associate Superintendent shall be entitled to a thirty-day vacation with full pay during each year of service under this contract. [¶] The vacation shall be taken at the end of the current year or in the next subsequent school year. In the event that the Associate Superintendent should be unable to take his just entitlement or vacation time under the provisions of this contract, due to the urgency of school district business, he shall so notify the Board at a legally constituted meeting of same, at which time the Board shall take positive action to continue his entitlement or purchase said entitlement at his daily rate of compensation under the provisions of this contract."



may take many forms. [¶] . . . *[I]n the area of public employment, the Court has held that* a public college professor dismissed from an office held under tenure provisions [citation] and *college professors and staff members dismissed during the terms of their contracts* [citation] *have interests in continued employment that are safeguarded by due process.* Only last year, the Court held that this principle 'proscribing summary dismissal from public employment without a hearing or inquiry required by due process' also applied to a teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. [Citation.]" (Emphasis added; 408 U.S. at pp. 576–577.)

As this passage clearly demonstrates, the existence of a contract providing for an individual's employment for a term of years itself gives rise to a "property interst" protected by the due process clause, without regard to the presence or absence of any complementary statutory tenure provisions. Indeed, in *Roth*, *all* of the justices agreed that a governmental entity's dismissal of an employee in the middle of an employment contract must be accompanied by notice and some kind of hearing. The controversy that divided the court in *Roth*, and in the companion case of Perry v. Sinderman (1972) 408 U.S. 593, was simply whether *in the absence of an explicit employment contract for a term of years* an employee had a right to notice and hearing when the employer refused to continue the employment relationship. Inasmuch as *Perry* holds that even in the absence of such an express contract the due process right to notice and hearing may attach if the employer's conduct gives rise to an "implied contract" for continued employment, the present plaintiff's constitutional right to notice and some kind of hearing follows a fortiori.

Indeed, in the wake of *Roth* and *Perry*, a number of federal and state decisions have explicitly held that school

administrators *in precisely the same position as plaintiff* are constitutionally entitled to notice and an opportunity to be heard prior to the termination of their employment contracts. (E.g., Hostrop v. Board of Jr. College Dist., No. 515 etc., Ill. (7th Cir. 1972) 471 F.2d 488, 494, cert. den., 416 U.S. 967; Peacock v. Board of Regents (D. Ariz. 1974) 380 F. Supp. 1081, 1086–1087; McClanahan v. Cochise College (1975) 24 Ariz. App. 13 [540 P.2d 744, 749]; accord Wertz v. So. Cloud Unified Sch. Dist. (1975) 218 Kan. 24 [542 P.2d 339, 344–346].)

As the Seventh Circuit stated in *Hostrop:* "A term of employment set by contract has been recognized as a property interest which the state cannot extinguish without conforming to the dictates of procedural due process. [Citations.] The existence of such a contractually established property interest obligates the Board to grant plaintiff a hearing where he can be fully informed of the reasons for his nonretention and challenge their sufficiency." (471 F.2d at p. 494.) The majority fail to discuss the *Hostrop* decision or any other of these directly applicable precedents.

Plaintiff has been deprived of his constitutional right to an opportunity to be heard by defendant board of trustees, the body that possesses the ultimate discretionary authority over his employment. I therefore believe that the requested writ of mandate should issue, directing the board to reconsider plaintiff's dismissal after affording him an opportunity to respond to the charges against him. Cf. Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 556–557.)

With all respect, the majority's failure to give effect to the clear mandate of the *Roth* and *Perry* decisions is, in my mind, simply inexplicable.

TOBRINER, ACTING C.J.



ORDER DENYING REHEARING

S.F. No. 23467

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

BARTHULI

v.

THE BOARD OF TRUSTEES,
JEFFERSON ELEMENTARY SCHOOL DISTRICT

Appellant's petition for rehearing and application for stay DENIED.

Bird, C.J. and Tobriner, J., are of the opinion the petition should be granted.

[Filed Aug. 25, 1977]

/s/ Bird
*Chief Justice*

## APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

ROGER BARTHULI,
Plaintiff and Appellant,

vs.

BOARD OF TRUSTEES, JEFFERSON ELEMENTARY SCHOOL DISTRICT,
Defendant and Respondent.[1]

1/Civil 35870

(Superior Court No. 177187)

[Filed March 8, 1976]

Roger Barthuli appeals from a judgment which denied a writ of mandate to compel respondent board of trustees of the Jefferson Elementary School District to reinstate him in the position of associate district superintendent for business.

Appellant had held the position of associate superintendent for business for eight years. On July 1, 1972, his contract was renewed for an additional four-year term. On July 11, 1973, the board of trustees of the district voted to rescind appellant's employment contract, although three years remained.

The trial court took the view that because the employment relation between respondent and appellant had been embodied in a contract, mandate was not a proper remedy to test the lawfulness of appellant's dismissal. Appellant

[1]The purported appeal by respondent is dismissed in this opinion.



correctly points out that his status as associate superintendent of schools is protected by statute. Education Code section 938[2] provides that an associate superintendent may be "elected" for a term of four years; "elect" is in this context synonymous with "employ" (*Main v. Claremont Unified Sch. Dist.* (1958) 161 Cal. App. 2d 189, 194). Although mandamus is not an appropriate remedy for a

[2]Education Code section 938: (All code references are to the Education Code unless otherwise noted.)

> Any district superintendent of schools, or deputy, associate, or assistant superintendent of schools, may be elected for a term of four years. The governing board of any school district, with the consent of the employee concerned, may at any time terminate, effective on the next succeeding first day of July, the term of employment of, and any contract of employment with, the superintendent of schools, or any associate, deputy, or assistant superintendent of schools of the district, and re-elect or re-employ the employee, on such terms and conditions as may be mutually agreed upon by the board and the employee, for a new term to commence on the effective date of the termination of the existing term of employment. In the event the governing board of a school district determines the superintendent of schools of the district is not to be re-elected or re-employed as such superintendent upon the expiration of his term, the superintendent of schools shall be given written notice thereof by the governing board at least six months in advance of the expiration of his term. In the event the governing board of a district fails to re-elect or re-employ the superintendent of schools of the district as such superintendent and the written notice herein provided for has not been given, the superintendent of schools shall be deemed re-elected for a term of the same length as the one completed, and under the same terms and conditions and with the same compensation.

breach of contract, it is available to protect a status which is created by statute even though a contract exists concurrently. (*Titus v. Lawndale School Dist.* (1958) 157 Cal. App. 2d 822; see also *Main v. Claremont Unified Sch. Dist., supra,* at 192.) The court erred in concluding that mandamus was not an appropriate remedy.

Where a trial court has erroneously determined that mandamus is not an available remedy, the appellate court may remand the cause for a determination by the trial court whether good cause existed for discharge of the appellant. (See *Titus v. Lawndale School Dist., supra,* 157 Cal. App. 2d at 838; see also *Main v. Claremont Unified Sch. Dist., supra,* 161 Cal. App. 2d at 207.) But in the present case the trial court has already determined, as an alternative ground of decision, that appellant's conduct justified rescission of the contract and termination of the appointment.

Appellant contends that there was not substantial evidence to support the trial court's findings that he breached his contract of employment and that good cause existed for his dismissal. But appellant improperly entered into a contract for computer services without informing the trustees; he failed to make sure that necessary maintenance was provided; he did not establish an adequate inventory control system; on many occasions appellant allowed expenditures on purchase orders to exceed the amounts authorized; and appellant instructed his secretary to split up individual purchase orders into several orders, inferably to conceal the fact that legal requirements for competitive bidding were being evaded. This evidence was contradicted by other evidence presented by appellant. But this court will not reweigh the evidence and reconsider the credibility of the witnesses. The trial court's findings were supported by substantial evidence and will not be disturbed on appeal.



(See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, §245, pp. 4236–4238.)

Appellant contends that the district should not have rescinded the contract of employment without first complying with provisions of the Education Code relating to the evaluation and dismissal of certificated employees. Appellant asserts that he had the right to an evaluation and dismissal of certificated employees. Appellant asserts that he had the right to an evaluation as provided for by section 13485 et seq., and the right to notice and a hearing prior to the district's termination of his employment contract (citing §§13403–13404, 13405, 13407). The Education Code provides for the establishment of "a uniform system of evaluation and assessment of the performance of certificated personnel within each school district of the state" (§13485);[3] each school district is required to develop and adopt specific evaluation and assessment guidelines (§13487).[4] Where a permanent employee of a school district is charged with unprofessional conduct or incompetence, the governing board of a school district is not permitted to act upon the charges without serving upon the employee a written notice of the charges which must include any applicable evaluations of that employee made pursuant to section 13485 et seq. (§13407). Where any charges other than unprofessional conduct or incompetency are brought against a permanent employee, the written notice is not required to contain any evaluations made pursuant to those guidelines (§13404). But whether guidelines and evaluations are required or not, a permanent employee may be deprived of his position only for those causes specified by the Education Code (see §13447) and

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[3]Amended, Stats. 1975, ch. 1216, §4.

[4]Repealed and replaced, Stats. 1975, ch. 1216, §§6, 7.

only so long as the governing board of the school district has given him notice of its intention to dismiss him and has provided him with an opportunity to demand a hearing prior to dismissal (§13404).

However, administrative and supervisorial personnel of school districts are not permanent employees as such; although they may be required to hold teaching certificates, they may be permanent employees as and only as classroom teachers. (*Council of Directors and Supervisors v. Los Angeles Unified School Dist.* (1973) 35 Cal. App. 3d 147, 152; *Titus v. Lawndale School Dist., supra,* 157 Cal. App. 2d 822, 824; see also §13315.) Instead, administrative personnel may have their employment terminated by a school district's mere giving of notice at least six months prior to the expiration of the employee's term of employment that the employee will not be reemployed; there is no requirement of a statement of cause or even that cause exists for the termination of the employment of administrative personnel. (See §938.) Therefore, appellant cannot claim the benefit of those Education Code provisions concerning the termination of permanent employees insofar as he seeks relief for his termination as associate superintendent of schools.

Nonetheless, the manner in which appellant was discharged violated his constitutional due process rights. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits" (*Board of Regents v. Roth* (1972) 408 U.S. 564, 576). An individual has a property interest in a specific benefit when he has "a legitimate claim of entitlement to it." (*Id.*, 577.) In *Skelly v. State Personnel Bd.* (1975) 15 Cal. 3d 194, it was held that permanent civil service employees of the State of California have a property interest in the continuation of their employment which is protected by due process. In



reaching this conclusion, it was stated "that the existence of the [property] interest is to be determined in the first place under applicable state law, but that the adequacy of the procedures is to be measured in the final analysis by applicable constitutional requirements of due process." (15 Cal. 3d at 212.) Appellant was employed by the district under a contract of employment which continued until July 1976. This contract was specifically authorized under section 938, and therefore appellant had a property interest in the continuation of his employment created by and authorized by applicable state law.

Where an agency of the state seeks to discipline an employee by levying some sanction against him or extinguishing his contract of employment, "due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." (*Skelly v. State Personnel Bd., supra,* 15 Cal. 3d at 215; see also *Hostrop v. Board of Junior College Dist. No. 515, etc. Ill.* (7th cir. 1972) 471 F.2d 488, 494, cert. den. 411 U.S. 967). Appellant received no notice of the district's intention to rescind his contract of employment prior to the board of trustees' vote to rescind, the reasons for such action and notification of any charges against him, or the right to respond to the charges and have a hearing before the district school board. Therefore, the trial court should have directed issuance of a writ of mandate directing the district to reinstate appellant subject to the district's right to institute proceedings against appellant for his termination in compliance with procedural requirements of due process.

(See *Skelly v. State Personnel Bd., supra*, 15 Cal. 3d at 219–220, and note 34 at 220.)

*Hentschke v. Sink* (1973) 34 Cal. App. 3d 19, is to be distinguished. There it was held that an administrator may be removed from his position at the pleasure of the appointing power without any hearing or prior statement of cause. There is no evidence that Hentschke had a con tract of employment, or a status protected by a statute, which would have created a property interest in the continuation of his administrative position; in the present case, appellant had a four-year contract of employment which the district sought to rescind.

Appellant also contends that he should have been reassigned as a classroom teacher. But such relief was not sought in the petition for writ of mandate; it is therefore not properly before this court.

The judgment is reversed, with directions to issue a writ of mandate directing reinstatement of appellant, without prejudice to the right of respondent to seek rescission or termination of the employment contract upon the application of appropriate procedural due process. Respondent's purported appeal from part of the findings of fact is dismissed.

Christian, J.

We concur:

Caldecott, P. J.
Rattigan, J.



## APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

Present Hon. Robert E. Carey, Judge of the Superior Court

No. 177187 Roger Barthuli vs. Board of Trustees, Jefferson Elementary School District

Court Trial: Petition for Writ of Mandate

Trial: October 9, 10, 15, 16, 17, 18, 19, 24, 1973

### DECISION

[Filed January 23, 1974]

Two major questions are raised in this case for the Court's consideration: One as to a matter of law, and the other as to a matter of fact affecting the substantial rights of the parties.

The first is the question of whether mandamus is a proper remedy for a school district administrator serving under a multiple year arrangement to seek restoration to a status created by statute as well as by contract.

Inherent to this determination is whether the petitioner has an adequate remedy of law and, in particular, the application of the Titus v. Lawndale School District case (1958) 157 Cal. App. 2d 822.

Although the question is a close one, the Court is of the opinion that the Titus case is distinguishable from the facts in this case. The Titus case involves the status of a superintendent of schools who was, at the same time, a probationary certified employee working toward permanent status as a classroom teacher.

The opinion in holding that his expectancy of permanence as a classroom teacher gave him status to sue in mandamus does not clearly indicate what remedies are specifically available to him as a superintendent, under the facts of this case.

Petitioner could protect his status of a certificated employee as a classroom teacher by way of mandamus, but such is not in issue here.

Also inherent is the practical problem centering about the sensitive relationship of top school district administrators and the governing boards of such districts. Necessary to the orderly operation of the schools and principally for the benefit of the students and pupils served, such boards must have the ability to select their administrators and maintain with them a mutual respect and confidence and an intimate working relationship.

Under the facts of this case, petitioner's status as Associate Superintendent of Business is based solely upon contract and pursuant to the applicable provisions of the law relating to the prerequisites of mandamus, the Court is of the opinion that petitioner may be made whole at law in an action for breach of contract and an award of money damages for asserted breach of contract by respondent.

Accordingly, the Court finds that the petitioner has an adequate remedy at law and is not entitled to seek relief by way of mandamus.

Noting that the statutory law and the decisions of the courts have not clearly decided whether or not mandamus is a proper remedy for a school district administrator, serving under a multiple year arrangement to seek restoration to a status created by statute, as well as by contract, the Court will, for the purposes of this case, proceed further to a determination of the application of that remedy.



The next question, therefore, would be whether the respondent school board of trustees showed by a preponderance of the evidence that petitioner failed to perform his contract of employment, which commenced July 1, 1972 and was to run until June 30, 1976, and that good cause existed for his dismissal; that is, was there substantial nonperformance by the employee of his contract.

The party breaking the contract, here the respondent, must show good cause therefore; that is, to introduce evidence to show the truth of the charges upon which they acted.

There appear no statutory guidelines with regard to the termination of the services of a school district administrator. As a contract employee, it would appear that general contract law principles apply.

The course of conduct followed by the petitioner in his employment with respondent, as shown by the evidence, evidences to the Court a substantial breach of the employment relation, giving to respondent the right to rescind the employment contract. Petitioner's conduct is found to be inconsistent with the orderly operation of the public schools and created an unstable relationship between a top level administrator and the governing board.

Such course of conduct is evidenced to the Court by, but not limited to, the following: Petitioner's improper bidding practices and issuance of purchase orders, his failure to follow the law in that regard, his failure to follow and carry out the directives and policies of this board, and his failure to adequately prepare, maintain and assume the general management of the district's transportation, budget, contracts and leases, purchases and warehousing, maintenance of physical plant, payroll and related records, accounts payable, inventory of equipment, and necessary repairs.

The Court therefore finds that the petitioner substantially failed to adequately perform the duties of his position pursuant to his contract of employment and that the respondent properly considered such a breach of contract and properly rescinded the contract of employment upon grounds that the petitioner failed to adequately perform.

The peremptory writ is denied.

If findings of fact and conclusions of law are requested by either party, the attorney for the respondent is requested and directed to prepare same for the Court.

Dated: 22 January 1974 /s/ Robert E. Carey
Judge of the Superior Court

Supreme Court, U. S.
FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1977

## No. 77-707

ROGER BARTHULI,
*Petitioner,*

vs.

BOARD OF TRUSTEES OF JEFFERSON ELEMENTARY SCHOOL DISTRICT,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of California**

## BRIEF FOR RESPONDENT IN OPPOSITION

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December 14, 1977.

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# In the Supreme Court
OF THE
# United States

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OCTOBER TERM, 1977

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No. 77-707

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ROGER BARTHULI,
*Petitioner,*

VS.

BOARD OF TRUSTEES OF JEFFERSON ELEMENTARY SCHOOL DISTRICT,
*Respondent.*

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**On Petition for a Writ of Certiorari to the Supreme Court of California**

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## BRIEF FOR RESPONDENT IN OPPOSITION

---

### OPINIONS BELOW

The Opinion of the Supreme Court of California, dated July 22, 1977, is reported in 19 Cal.3d 717, 139 Cal.Rptr. 627 and 566 P.2d 261, and is reprinted as App. A, p. 1a, of Petition.

The Opinion of the Court of Appeal, First Appellate District, filed on March 8, 1976, has not been

reported; it is reprinted as App. B, p. 12a, of Petition.

The Memorandum Decision of the Superior Court for the State of California, County of San Mateo, filed on January 23, 1974, has not been reported; it is reprinted as App. C, p. 19a, of Petition.

The Findings of Fact and Conclusions of Law of the Superior Court for the State of California, County of San Mateo, filed on March 26, 1974, has not been reported; it is reprinted as Appendix A, page 1a, *infra.*

---

**JURISDICTION**

The jurisdictional requisites are adequately set forth in the Petition.

---

**QUESTION PRESENTED**

Whether state law creating an interest in public employment should be given effect as defining the extent of that interest?

---

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The pertinent provisions of the United States Constitution and the California Education Code §§938 (renumbered §35031), 13314 (renumbered §§44893, 87454) and 13315 (renumbered §§44897, 87458) are set forth in the Petition at pp. 3-5.



California Civil Code §3390:

The following obligations cannot be specifically enforced:

1. An obligation to render personal service;

2. An obligation to employ another in personal service;

3. An agreement to perform an act which the party has not power lawfully to perform when required to do so;

4. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or,

5. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.

---

**STATEMENT**

This litigation concerns the rescission of petitioner's contract for the position of Associate Superintendent for Business in respondent's school district.

On July 11, 1973, respondent Board of Trustees rescinded petitioner's contract as Associate Superintendent for Business because of his prior breach of his employment contract. Although petitioner was entitled to return to the district as a permanent certificated employee, a classroom teacher, when the fall semester commenced petitioner did not seek employment status as a classroom teacher. Instead, petitioner, on July 17, 1973, filed a petition for a writ of mandate to compel his reinstatement as an Associate Superintendent for Business. On July 25, 1973,

respondent filed its answer to the petition and on October 9, 1973, an 8-day trial commenced in the Superior Court of the State of California, for the County of San Mateo. The Superior Court found that petitioner had an adequate remedy at law and that he had breached his contract with respondent school district in several respects, thus giving respondent the right to rescind. The Superior Court's Findings of Fact and Conclusions of Law are attached as Appendix A hereto, page 1a, *infra.*

The decision of the Superior Court was appealed to the Court of Appeal, First Appellate District, which Court issued its opinion reversing the decision of the Superior Court with directions to issue a writ of mandate directing reinstatement of petitioner. Respondent petitioned the Supreme Court of the State of California and a hearing was granted.

The Supreme Court of California filed an Opinion (App. A of Petition) affirming the judgment of the Superior Court. In its opinion the Supreme Court analyzed the applicable state law and held that California law provides that an administrator is not a permanent employee, as such, and that such person's tenure (permanence) rights and thus his property rights are those of a classroom teacher, not those of an administrator. (App. A of Petition, p. 5a)

---

**ARGUMENT**

The issue in the present case is distinguishable from the line of cases decided by this Court and other



federal and state courts wherein a public employee's interest in continued public employment was at issue. In this case, petitioner's interest in continued employment is as a classroom teacher, and that fact has never been questioned.

Thus, while petitioner retained his status as a permanent certificated employee, he was given a full, fair and impartial hearing concerning the validity of respondent's reasons for rescinding his contract because of his prior breach thereof.

The decision of the Supreme Court of California is manifestly correct. There is no conflict of decision nor is there an important question of federal law requiring a decision by this Court.

---

## I

### THE DECISION BELOW IS CLEARLY CORRECT

The California Supreme Court thoroughly analyzed the applicable state law with regard to a property interest in continued public employment.

Although California Education Code §938 (renumbered §35031) authorizes a contract for a term of four years, other provisions of the California Education Code specifically define any property interest arising therefrom. California Education Code §13314 (renumbered §§44893, 87454) provides that the permanent classification of an employee advanced from a teaching position to an administrative or supervisory position is that of a classroom teacher. Cali-

fornia Education Code §13315 (renumbered §§44897, 87458) provides that the permanent classification of an individual employed in an administrative or supervisory position, upon completion of a specific period of time, is that of a classroom teacher.

California Civil Code §3390 provides that obligations to render personal service or to employ another in personal service are not specifically enforceable; however, parties to such contracts have an adequate remedy at law for breach of contract and an award of money damages.

In *Bishop v. Wood* (1976) 426 U.S. 341, at pp. 344-345, 48 L.Ed.2d 684, 96 S.Ct. 2074, the Court states:

> "A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee. Still v. Lance, 275 NC 254, 182 SE2d 403 (1971). Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question."

As in *Bishop,* the California Supreme Court's reading of the applicable statutes is tenable and therefore sufficient to foreclose independent examination of the state law issue.



## II

### THE DECISION BELOW DOES NOT CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT OR OTHER COURTS WITH RESPECT TO DEFINING A PROPERTY INTEREST IN A SPECIFIED TERM PUBLIC EMPLOYMENT CONTRACT

Petitioner postulates that the decision below totally ignores the rulings of this Court and/or other courts to the effect that a contractual term of employment confers a property interest protectable by the Due Process Clause of the Fourteenth Amendment. THIS POSITION IS CLEARLY WRONG!

This Court's decisions are uniform in holding that once a state has granted a "property interest" in employment, such an interest is safeguarded by procedural due process. The simple distinction between cases cited by petitioner and the case at bar is that petitioner was never denied continued public employment as a full-time, permanent, certificated employee of respondent school district with all the attendant rights and benefits.

Thus, this is not such a case as described by Justice Marshall in his dissenting opinion in *Arnett v. Kennedy* (1974) 416 U.S. 134, 40 L.Ed.2d 15, 94 S.Ct. 1633, wherein an employee's employment is terminated, job opportunities may be few and benefits are suspended. Rather, this is a case where balancing of necessity, such as governmental interest versus individual interest is weighted entirely on the respondent's side.

## III

### THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Petitioner finally postulates that the questions raised by the decision below are of far-reaching importance affecting countless public school administrators throughout the United States. This position is also in error.

The decision below has a direct impact upon California school administrators. This impact, however, is limited to administrators, whose contracts are governed by the same provisions of state law. To say, as petitioner has said, that the decision below placed countless numbers of school administrators under the direct threat of summary dismissal enshrines an hypothesis to the exclusion of reality. That this is so is clearly exhibited by the decisions petitioner has cited in support of his position. Each of those decisions involved a terminated employee's interest in continued public employment, an element not existing here. The California statutory law has carefully protected an employee's interest in continued public employment, an important element missing in the cited decisions.

The California Supreme Court has reviewed state law, which authorizes the contract entered into between the petitioner and respondent, and other applicable state law provisions relating thereto. By statute, petitioner attained tenure (permanence) as a classroom teacher. Statutes set forth the procedure for the termination of such right. These procedures are



consistent with the due process requirement of the Fourteenth Amendment. Although the state law is silent on procedures for termination of administrators' contracts, the absence of such procedures does not invalidate the action taken by the respondent school district. Quite to the contrary, applicable state law provides an adequate remedy at law to safeguard petitioner's interests by way of an action for breach of contract, while continuing in the employ of respondent's school district.

The decision below comports with the requirements of the Due Process Clause of the Fourteenth Amendment in all respects.

---

### CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,
LAW OFFICES OF WILLIAM R. JOHNSTON,
By WILLIAM R. JOHNSTON,
JOSEPH P. BINGAMAN,
*Counsel for Respondent.*

December 14, 1977.

**(Appendix A Follows)**

APPENDIX "A"

## Appendix A

Superior Court of the State of California
for the County of San Mateo

No. 177187

| | |
|---|---|
| Roger Barthuli, | Petitioner, |
| vs. | |
| Board of Trustees, Jefferson Elementary School District, | Respondent. |

[Filed Mar. 26, 1974]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on October 9, 10, 15, 16, 17, 18, 19 and 24, 1973, before the Court sitting without a jury. William E. Brown, Attorney at Law, appearing as counsel for petitioner and William R. Johnston, Attorney at Law, appearing as counsel for the defendant, and the Court having heard the testimony and examined the proofs offered by the respective parties, and the parties having filed their written argument, and the cause having been submitted to the Court for decision, the Court being fully advised in the premises now makes findings of fact as follows:

1. That petitioner did not duly and faithfully perform all of his obligations as set forth in his contract of employment with the respondent, which contract was entered into on June 21, 1972, and commenced July 1, 1972, and was for a period of 4 years, a copy of which was attached as Exhibit A to the Petition for Writ of Mandate of petitioner on file herein.

2. That petitioner breached said contract of employment and that good cause existed for his dismissal in that he did:

(1) Fail to adequately prepare, maintain and assume responsibility for the general management of:

(a) School district transportation;

(b) School district budget;

(c) School district contracts and leases;

(d) School district purchases and warehousing;

(e) Maintenance of school district physical plant;

(f) School district payroll and related records;

(g) School district accounts payable;

(h) Inventory of school district equipment;

(2) Fail to carry out the directives and policies of respondent;

(3) Fail to carry out the provisions of the California Education Code with regard to competitive bidding;

(4) Improperly split purchase orders to avoid the above referenced competitive bidding requirements;



(5) Permit improper utilization of school district property.

3. That respondent at a special meeting held on July 11, 1973, did rescind petitioner's contract as Associate Superintendent-Business with respondent.

4. That respondent did properly consider petitioner's breach of contract and did base its rescission on such grounds.

5. That petitioner did not request in writing a statement of the reasons or the findings of fact upon which respondent acted to rescind petitioner's contract.

6. That petitioner at no time did request in writing a hearing before respondent regarding the rescission of his contract.

7. That petitioner had served in the position of Associate Superintendent-Business with the Jefferson Elementary School District for 12 years.

8. That petitioner had acquired the status of permanent certificated employee of the Jefferson Elementary School District as a classroom teacher.

9. That petitioner had the rights of a permanent certificated employee in and to the position of classroom teacher.

10. That petitioner sought reinstatement to his administrative position as Associate Superintendent-Business.

11. That petitioner did not and has not sought reinstatement to the position of classroom teacher.

From the foregoing facts, the Court concludes:

1. That evidence of Petitioner's conduct occurring outside the current contract term (i.e., before July 1, 1972, or June 21, 1972) is irrelevant to the issues presented herein, and was, therefore, properly excluded when such evidence was offered by respondent.

2. That respondent, Board of Trustees of the Jefferson Elementary School District, is charged by law with the orderly operation of the school district and is vested with wide discretion as to the employment and retention of suitable personnel.

3. That Section 938 of the California Education Code is not relevant to these proceedings because a school district governing board may rescind a contract of employment of an Associate Superintendent for Business who fails to adequately perform the duties of his office.

4. That petitioner's conduct did constitute substantial failure of performance of his contract with respondent and said substantial non-performance did provide respondent with grounds to rescind said contract.

5. That Section 938 of the California Education Code does not impose a clear duty on respondent to reinstate petitioner to his position of Associate Superintendent-Business.

6. That petitioner's status as Associate Superintendent for Business is based upon contract.

7. That petitioner has an adequate remedy at law for money damages based on breach of contract and



that, therefore, petitioner is not entitled to seek relief by way of mandamus.

Let judgment be entered accordingly.

Dated: Mar 25 1974

Robert E. Carey
Judge of the Superior Court

No. 77-707

Supreme Court, U. S.
FILED
DEC 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

ROGER BARTHULI,

*Petitioner,*

v.

BOARD OF TRUSTEES OF JEFFERSON ELEMENTARY SCHOOL DISTRICT,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

**BRIEF IN SUPPORT OF PETITIONER BY AMICI CURIAE: (1) AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS; (2) ASSOCIATION OF CALIFORNIA SCHOOL ADMINISTRATORS; (3) ARIZONA SCHOOL ADMINISTRATORS, INC.; (4) ARKANSAS ASSOCIATION OF EDUCATIONAL ADMINISTRATORS; (5) BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS; (6) FLORIDA ASSOCIATION OF SCHOOL ADMINISTRATORS; (7) KANSAS ASSOCIATION OF SCHOOL ADMINISTRATORS; (8) KENTUCKY ASSOCIATION OF SCHOOL ADMINISTRATORS; (9) MASSACHUSETTS ASSOCIATION OF SCHOOL SUPERINTENDENTS, INC.; (10) NEW YORK STATE COUNCIL OF SCHOOL DISTRICT ADMINISTRATORS; (11) OREGON ASSOCIATION OF SCHOOL EXECUTIVES; (12) PENNSYLVANIA ASSOCIATION OF SCHOOL ADMINISTRATORS; (13) SCHOOL ADMINISTRATORS OF SOUTH DAKOTA; (14) SOUTH CAROLINA ASSOCIATION OF SCHOOL SUPERINTENDENTS; (15) WISCONSIN ASSOCIATION OF SCHOOL DISTRICT ADMINISTRATORS.**

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December 5, 1977

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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**No. 77-707**

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ROGER BARTHULI,

*Petitioner,*

v.

BOARD OF TRUSTEES OF JEFFERSON ELEMENTARY SCHOOL DISTRICT,

*Respondent.*

---

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA**

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## AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

---

With the consent of counsel for both parties,* this brief *amici curiae* is filed on behalf of the following organizations:

(1) American Association of School Administrators; (2) Association of California School Administrators; (3) Arizona School Administrators, Inc.; (4) Arkansas Association of Educational Administrators; (5) Buckeye Association of School Administrators; (6) Florida Association of School

*The letters of consent are being filed with the Clerk of this Court, simultaneously with the filing of this brief.

Administrators; (7) Kansas Association of School Administrators; (8) Kentucky Association of School Administrators; (9) Massachusetts Association of School Administrators, Inc.; (10) New York State Council of School District Administrators; (11) Oregon Association of School Executives; (12) Pennsylvania Association of School Administrators; (13) School Administrators of South Dakota; (14) South Carolina Association of School Superintendents; and (15) Wisconsin Association of School District Administrators.

## INTEREST OF THE AMICI CURIAE

The American Association of School Administrators, the first-named *amicus* herein, is a national professional organization of public school administrators. A nonprofit group, it has about 17,100 members at present. Its members include school administrators throughout the nation of virtually every rank, the greatest number being superintendents, deputy superintendents and associate or assistant superintendents (such as was the petitioner Roger Barthuli).

The other fourteen *amici* are various state associations of public school administrators, affiliated with the national association. Like the latter, each statewide organization's membership is composed of public school administrators and supervisors. The Association of California School Administrators, the second-named *amicus* herein, is the largest of these state associations, with a membership of over 12,000 such professionals.

Both the national and the state organizations share the primary purpose of seeking to unite all such administrators and supervisors in the betterment of public education. They promote and provide leadership to advance the public interest in improved schools; and they strive to improve the preparatory and inservice training of educational personnel. Constant efforts are being made to upgrade teaching and learning, to improve the curricula, and to eliminate prejudice, bigotry and discrimination within the profession. More particularly, they represent the desires and concerns of their members with respect to their basic legal and administrative rights and obligations.



That latter concern of the *amici*, the concern that the constitutional and legal rights of their members not be unduly impaired, has led them to file this brief. They view the *Barthuli* decision of the California Supreme Court as destructive of what has heretofore been considered an inviolate right of public school administrators – i.e., their constitutional right not to be summarily discharged, without notice or hearing, prior to the expiration of their multi-year employment contracts. They greatly fear that their professional futures, and indeed the future effectiveness of much of the public school system, are threatened by the negative precedential impact of the *Barthuli* decision.

## REASONS WHY THE AMICI SUPPORT THE PETITIONER

The *amici* fully subscribe to the petitioner's analysis of the case and his reasons why review should be granted. As Justice Tobriner said in dissenting below, the California court's "failure to give effect to the clear mandate of the *Roth* and *Perry* decisions is, in my mind, simply inexplicable." Pet. App. 10a. And by its excessively constricted view of applicable state law, with respect to determining what property interests are protected by the Fourteenth Amendment's Due Process Clause, the majority below has bent beyond recognition the "unfettered discretion" principal of *Bishop v. Wood*, 426 U.S. 341, 350, n. 14 (1976).

But this brief is not designed to restate the constitutional and legal considerations set forth in the petition. Its purpose, rather, is to elaborate and emphasize the petitioner's assertion (Pet. 21-22) that the questions raised by the decision below pose a direct threat to the the many thousands of public school administrators throughout the United States who are serving under the same kind of multi-year employment contract as was the petitioner, Roger Barthuli.

It is a fact, of course, that the multi-year employment contract is in common use for employees at the superintendent level in virtually every state in the Union. It is also used, though with somewhat less frequency, for professionals occupying the positions of deputy, associate and assistant superintendent. Indeed, in California, Section 938 of the Education Code makes contracts up to four years in length the standard for all types of superintendents, including the deputies, associates and assistants. Some of these long term contracts that are individually negotiated may contain their own dismissal or termination procedures, which usually reflect basic due process requirements. But most such contracts, such as the one here in issue, are rudimentary form contracts developed by school board attorneys; they normally contain no provision for dismissal or termination prior to the expiration of the contract term and hence contain no due process guidelines. Whatever due process must be accorded dismissals under these form contracts comes only from the Due Process Clause of the Fourteenth Amendment.

The wide use of the multi-year employment contract, particularly of the four-year variety, is not a chance development. It was deliberately designed both (1) to permit the delivery of quality educational leadership, and (2)



to protect the administrators' property interest in maintaining an employment relationship of sufficient duration to permit effective development of educational programs. Administrators are often selected to bring about changes in school systems. Yet the size and complexity of many school systems make it difficult to achieve such changes quickly. While the change is underway but not yet accomplished the administrator-proponent of a controversial change may be subject to great pressures from those seeking to preserve the status quo. The multi-year contract is a security-giving instrument for an administrator facing this kind of situation. And it is a situation frequently confronting administrators required by law to implement multi-year programs of school desegregation and integration, where those policies are highly unpopular with various interest groups in the community. A multi-year contract is a powerful shield for a conscientious administrator carrying out a court order against the community's expressed will.

With the advent of public employee collective bargaining, moreover, public school administrators are often put into an adversary position vis-a-vis other school district employees, thereby causing political pressures to be brought on the administrators. A multi-year contract offers the security necessary for such an administrator to continue to support the public interest as reflected by the board of education's policy.

Thus the multi-year employment contract has come to play an important and permanent role in the administration of the nation's public school systems. Any threat to the continued efficacy of such contracts necessarily is a threat to the capacity of the school systems to attract and maintain qualified administrators. The *Barthuli* deci-

sion by the California Supreme Court constitutes just such a threat. By removing all due process restrictions on this kind of a summary termination, the decision has thrown into confusion the professional security so essential to the functioning of our public school system. Since most multi-year contracts lack any contractual or statutory due process protections, they are particularly vulnerable to any judicial lifting of the Due Process Clause of the Fourteenth Amendment from the sphere of public school administrators. In sum, the entitlement of such administrators to the benefits of precedural due process with respect to dismissal from their long term employment contracts is frequently dependent upon judicial recognition of the applicability of the Due Process Clause. And it is precisely because the *Barthuli* decision has rejected that recognition that causes the decision to be viewed with such fear and foreboding by the entire administrative personnel of the nation's schools.

That the threat posed by the *Barthuli* ruling is not imaginary is demonstrable by reports from the various *amici*. In California, for example, the school boards have been advised by their state association that, as a result of the *Barthuli* decision, school administrative personnel "have no property right in their employment and, therefore, do not have the rights of due process of notification, hearing, etc. prior to any termination for cause." *Newsgram* of California School Boards Association, Vol 77, No. 8, Aug. 29, 1977, p. 1. And the *Barthuli* decision has been repeatedly cited by school board counsel in California in justification of ongoing efforts to oust administrative personnel before completion of their contractual term of office.

The Massachusetts Association of School Superintendents, one of the *amici*, reports that the *Barthuli* decision is



likely to have an impact on a court action in that state (*Colman v. Parquette, et al.*, Superior Court No. 5188), wherein a public school superintendent, summarily discharged from his position two years before the expiration of his contract, is attempting to regain his position and to vindicate his due process rights. The Kentucky Association of School Administrators states that, while the Kentucky school laws provide for giving reasons for termination, "due process is limited and would be affected by a decision to uphold the ruling of the California Supreme Court." And in explaining its substantial interest in the *Barthuli* ruling, the Wisconsin Association of School District Administrators has commented:

> "Annually, we render advice, through our legal counsel, to a small but significant number of school district administrators who face potential termination of their employment, despite the fact that they have a contract in effect with their local school district. In virtually all such cases the issue of the due process rights and the 'property' rights of the school administrator in his job become important. The point at which these administrators face this issue usually relates to their rights to face their accusers, receive a written list of the charges being brought against them, the right to provide evidence and testimony to rebut these charges, and their right to counsel before the board of education which will decide their fate.
>
> "Although we know of no case in the State of Wisconsin in which the *Barthuli* decision has been cited, we have no doubt

that the *Barthuli* case will become an important precedent in this state. Wisconsin law frequently parallels that of the State of New York and the State of California in issues of this type. As a result, we anticipate that as the *Barthuli* decision becomes known to counsel for school districts, we will see it cited for purposes of denying a school administrator of what we believe to be his due process rights. Furthermore, we are very concerned that the Wisconsin Supreme Court might someday cite this case in support of a decision which would deny a school administrator of what we believe to be his due process rights in employment termination cases."

Such, then are the feared consequences of a decision that transforms all term employment contracts of public school administrators into contracts summarily terminable at the will of the school board employers. In a word, the *Barthuli* decision is a signal to school boards throughout the land that they may ignore with impunity their comitments to employ administrative personnel for a stated period of time, and that they may ignore with impunity all the fine promises of the Due Process Clause of the Fourteenth Amendment. The *amici* submit, however, that this Court should not and cannot permit such a signal to be given.

One final note is in order. The suggestion of the court below that the petitioner Barthuli was really not injured because he retained his tenure as a classroom teacher is unsound, legally and practically. No amount of tenure as a classroom teacher can cure a due process defect in dis-



missing such a teacher from a position as an administrator. No citation of authority is necessary to prove the fact that the school administrator performs a function entirely separate and apart from the classroom teacher. As an administrator, an individual is an agent of the school district governing board and is a part of the management team. And as a manager, he has a different set of responsibilities, including fiscal responsibility. By any token, the professions of teaching and administering are regarding by all persons in the school community as separate and distinct.

To suggest, therefore, that an administrator should be satisfied with the idea of a demotion or reassignment to a classroom position is totally unrealistic. The effect of such a reassignment, after years of serving as an administrator, is essentially to deprive one of a chosen profession, particularly in an era when administrative positions are becoming more scarce. A person once summarily discharged from an administrative position is not likely to emerge again in another administrative capacity; nor is his future as a classroom teacher, if he were to accept the reassignment, readily assured. To force an administrator to accept a classroom assignment, as the price for being summarily discharged as an administrator and without supporting objective evidence to justify the reassignment, is tantamount to capricious professional assassination. Such cannot be the spirit or the objective of the Due Process Clause of the Fourteenth Amendment.

## CONCLUSION

For these intensely practical reasons, the *amici* fully support the grant of review in this case, to the end that the destructive and retrogressive decision below may be reversed and the due process rights of public school administrators once again vindicated.

Respectfully submitted,

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